THE PROFESSION OF LAW IN ROME

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Every reader of works on the literature of the Roman Empire has probably at some time come across the statement that the Romans, having little or nothing to do with public life, gave their attention to literature, and that from such a cause began the reign of rhetoric and a decline into dilettantism. A very recent and valuable book by W. C. Summers, The Silver Age of Latin Literature, emphasizes this idea in a paragraph about "imperial Rome, where men of ambition, who found the main outlet of their energies closed by the almost total extinction of political life naturally fell back upon the once subsidiary channels of literary fame."

It may be that this attitude, which hardly represents more than half the truth, is due, at least in part, to the fact that in the predominating impression which a man's literary work makes, his active career is often forgotten or belittled. The present generation regards Macaulay as a writer of history, essays, and poetry; but his own contemporaries must have considered him a government official and a statesman. He spent many a year as an active member of Parliament, and held a very responsible position in India.

And there are men of Rome to whom the quotation from Summers can not apply. Pliny the Younger now holds a place in Roman literature as a writer of letters; but in Rome he was a member of the senate, a counsel in trials of importance, and an imperial governor for several years in Bithynia. This man hardly had the outlet for his energies closed. And if the charge of dilettantism may be brought against him, its cause was not that he was out of touch with public life. Iulius Frontinus, an older friend of Pliny, a man with a great military reputation, at one time commissioner of the water supply, wrote books on military matters and on Roman aqueducts. The books owed their origin to his practical experiences. Their style is not elegant, but simple

and direct, and not the product of a dilettante. To literary history Frontinus is known as their author; yet to a man of his time they can not have loomed large in an estimate of Frontinus' activities.

Great numbers of able men did no literary work or near-literary work at all, but were trained to be administrators, governors of peaceful provinces, military leaders in warlike provinces. Such men found outlets for their energies in public careers. Agricola is a fair example. There is an inscriptional record of a Sergius Severus who, in the second century, besides holding the usual senatorial positions at Rome, was successively governor of Dacia, Moesia Inferior, Britain, Judea, and Syria—from one end of the Roman world to the other, in vitally important situations.

But there was another profession, which required all a man's energies to win success, which was considered worthy of any man's devotion, which had a very direct relation to governmental and economic problems, which was no field for the dilettante nor the lover of rhetoric—the legal profession. Writings on that subject deserve consideration as a branch of literature, taking the term broadly to cover all writings in the form of books. Any history of literature, that of Summers for example, which gives space to scientific works like those of Frontinus, or perhaps, like the Natural History of Pliny the Elder, ought to give space to writers on the law. Summers finds no room for the jurists, though there were several of high rank in the period which his book covers. They are discussed in Schanz, Römische Literaturgeschichte. However, the question whether to classify them as literature or not is more or less academic, and may be allowed to rest.

A more important reason for the lack of attention to those works is probably to be found in the fact that practically none of them has come down to us directly. This fact has led a lawyer of some prominence to state, in an article published a year or so ago, "For 500 years following the overthrow of the Republic of Rome, aside from Aemilius Papinianus . . . there appeared but

a few great lawyers in Rome."[1] It is often stated that, generally speaking, the best of the literature of the ancients has been preserved, and that what has been lost is "small loss." There is truth in the idea, but not when applied to writings on law. The reason for this is very peculiar. When Justinian in the sixth century had the Digest compiled from the writings of the jurists, he passed a regulation that the original works themselves were no longer to be cited to support legal arguments, or for explanation. This was done to eliminate difficulties due to inevitable differences of opinion in the jurists' works. Thereafter they were only to be cited in so far as they appeared, in extracts, in the Digest itself. Naturally the Digest at once took the place of the original works. Fortunately, since for that work the cream of the jurists' writings had been skimmed, though there was little chance of the originals surviving, extensive quotations from them have survived. And from them it is possible to learn of the work of many individuals—the Digest quotes directly 39 of them, and many more are quoted by the 39. Their contributions and their relative importance can be studied. The fact then of the disappearance of the works in original form does not argue worthlessness, and offers little reason for disregarding them.

But the real reason for giving them adequate recognition in any study of writers of the Empire is that in the field of jurisprudence preeminently an advance was made, a tremendous development far beyond the limits reached in the time of the Republic. This development is sometimes underestimated or entirely overlooked. H. G. Wells, in his Outline of History, had not a word on it until one of his advisers called his attention to it. Even then he gave it slight attention, and his reader no conception of its significance. In the Digest the earliest jurist quoted belongs to the last century of the Republic—Q. Mucius Scaevola, by whose teaching of law Cicero profited. The vast mass of the Digest comes from writers of the Empire. Modern jurisprudence and modern systems of law are under a great debt to Roman Law. How great the debt is may easily be learned by a cursory reading

[1] Ed. J. White in The American Law Review (July-Aug. 1919) p. 510, an article on Lawyers of Ancient Rome.

of such a standard work on modern legal science as Holland's Jurisprudence. Holland often accepts Roman legal principles without change, often takes over their divisions and arrangements of subjects, and quotes their definitions as standard. The debt is largely due to Roman Law as developed after the time of Cicero. These considerations are significant in contrast to the idea that after Augustus' rule decline set in pretty generally, and that after all the Empire did little but preserve the Graeco-Roman civilization already developed. The fact is that the greatest period, the classical period, of Roman Jurisprudence finds its limits in the second century and the first half of the third century after Christ, a period which is often given its place by the estimate made of the works of Aulus Gellius and Fronto. To be sure in "pure literature" the decline had set in; but only near the end of the period can the sweeping statement be made that Rome had fallen on evil days.

All this may seem a little puzzling to anyone who recalls that the verdict of time has hailed Cicero, in the first century before Christ, Rome's greatest lawyer. Certainly Mr. White, to whose article reference has been made, was confused in placing under one classification Cicero, Papinian, and Tribonian. Cicero does stand preeminent, the leading lawyer in pleading cases before a court; but as a jurist, a student of legal principles, he has no standing. Nor did he claim any. That honor in his generation belongs to his friend, Sulpicius Rufus, to whom he pays tribute in the neat expression that he was "*non magis iuris consultus, quam iustitiae.*" Another great legal light of the day was Cicero' younger friend, Trebatius, known to readers of Roman Literature from Cicero's Letters and from Horace's Satires.

Cicero was the leading pleader, the first orator, and after his time, it is undoubtedly true, no great orator is known. It is a far cry from Cicero's Defence of Archias to Apuleius' Apologia, of the second century, with its far-fetched references to Moses and Zoroaster and Plato. Rhetoric had marked oratory for its own. Even the hard and practical cases of the law courts could not escape it. A delightful illustration of the point is offered in an incident related by the elder Seneca. Albutius, a teacher of

oratory and one with a considerable reputation, while conducting a case in court, rhetorically challenged his opponent's client: " 'Are you satisfied to have the matter settled by the taking of an oath? Take it then; but I will give the form. Swear by the ashes of your father, which lie unburied; swear by the memory of your father, which you have dishonored.' When he had finished, Lucius Arruntius (the famous senator of the reign of Tiberius) rose for the other side, and said: 'We accept the terms.' But Albutius shouted: 'I wasn't offering terms. I merely used a figure of speech.' But Arruntius insisted that he had. Albutius replied: 'If such a proposition holds, figures of speech are removed from the universe.' 'Let them,' says Arruntius, 'we can live without them.' (Tollantur, poterimus sine illis vivere.) And that was the end of it. The judges said that if the man would take the oath, they would decide against Albutius. He took the oath." The story goes on to tell that then and there Albutius gave up pleading in the forum.[1]

One of Martial's short poems also illustrates the point:

> Not poison, nor murder, nor assault, I charge,
> The theft of three goats have I fought.
> A neighbor, I say,
> Stole my three goats away:
> The judge demands proof to be brought.
>
> But Postumus, advocate mine, in your speech,
> On Cannae and war you dilate;
> Mithridates, the bold,
> And dread Carthage old,
> So treacherous, faithless, you prate.
>
> The Sullas, the Marii, Mucii too,
> You voice in magnificent notes.
> Your gestures are fine;
> But, advocate mine,
> Come, speak a word on my three goats.[2]

No one need believe the incident true; but perhaps there is as much truth as poetry in the general charge.

[1] Seneca, Controversiae VII.
[2] Martial VI, 19.

A reason often advanced for the decline of oratory is the fact of the loss of complete freedom of speech in forum and senate, and the non-existence of the give and take characteristic of political debate in the days of Cicero. Undoubtedly the great political change from Republic to Empire had its effect. One may compare, if it is fair to do so, the difference in attitude between Pliny's panegyric on the emperor Trajan and Cicero's tribute to Sulpicius Rufus. The contrast is marked. Yet it is a little hard to believe that law court oratory should have been so much affected by the political change. There was just as much as ever opportunity and demand for the plain statement of fact, for close reasoning, for keeping to the point. Speakers who saw the need for such qualities must have existed. Arruntius, of Seneca's anecdote, may well have been one of them; but no speech of his has survived. The products of Quintilian's teaching ought to have been worth listening to. However, the only extant law court speech in original form is the Apologia of Apuleius, which is generally accepted, and probably with reason, as a fair specimen of its time. Oratory had fallen under the spell of rhetoric.

But the writing of jurisprudence did not suffer from rhetoric's influence. In fact it developed a new style, neither Ciceronian nor like that of a Seneca or a Tacitus. From the standpoint of artistic beauty of style the works of the jurist Ulpian, for example, will hardly be compared with the De Republica or the De Legibus of Cicero. They ought not to be compared, for their purposes were so different. Cicero was in the large setting forth his political and philosophical ideas on government and the State, while Ulpian was developing mainly practical principles of law, illustrating them, and applying them to specific problems. The style, if style it may be called, developed by Ulpian and the school of jurists, was admirably adapted to its purpose. It is entirely devoid of ornament, as simple and plain and brief as can be, with almost no superfluous words used. It keeps strictly to the point, aims at clarity of expression, and pretty generally attains it. Its vocabulary and phrasing is of course strongly influenced by the subject matter, and by the conservatism which is characteristic of law. Its grammar is regularly that of its age.

For instance, the use of the infinitive of purpose, very rare in classical prose, is common.

Why did not the writing of jurisprudence come under the influence of rhetoric, as did other departments of literature? The question is not hard to answer. The jurists had to do with problems of very direct bearing on the economic, political, and social life of the times. Also, as has been stated, the science was developing in all its phases during the first centuries of the Empire. Practical problems demanded clarity of thought; to develop beyond the limits of the fathers demanded clarity of thought. And clarity of thought called for clarity of expression.

The fact of a great development of jurisprudence is recognized, and needs no proof. The causes of that development, at a time when there was a decline in many respects, are not so evident. Probably they can not be completely traced—seldom can all the causes for any movement be shown—but several important conditions favoring development can be indicated.

With the advent of the imperial form of government came peace within the Empire and safety from attack from without. The change from the old conditions offered remarkable opportunities for economic development, for business. Again, the centralization of power in Rome inevitably continued to work toward the unifying of all the various civilizations of the Empire, even though it was a principle of the Romans to respect local customs and traditions. Unity, it is true was never attained, but it was so nearly approached that the poet, Rutilius Namatianus of Gaul, in the fifth century, could say: "You have made of diverse races one fatherland." Peace, stable conditions, and consequent prosperity, together with the unification of the Empire, offered not only opportunities, but created a crying need for the development of law, public and private. When these conditions failed to continue after the reigns of the Severi in the third century, the development of law was greatly retarded. The impetus of conditions was effective.

The development was fostered by the emperors, actively and passively. As a rule they did not arbitrarily interfere, and especially not with private law. There was a real continuity from

reign to reign, of which it is not easy to get a view, and which is often not adequately appreciated therefore. In this respect the correspondence between the emperor Trajan and Pliny, when governor of Bithynia in Asia Minor, is important. It gives a very unusual and illuminating glimpse behind the scenes of government. Read Tacitus, Suetonius, and Pliny himself in his private letters, and the impression would be gained that the murder of the tyrant Domitian and the overthrow of his government resulted in a complete reversal of policy under the new régime. Reversal there was; but complete reversals were no more actually brought about in ancient times than when, in modern, the Democrats give way to the Republicans. Pliny is found questioning the emperor on the status of certain provincials and quoting certain regulations of Augustus, Vespasian, Titus, and Domitian. Trajan's decision, in his reply, recognizes the rulings of Domitian as far as applicable.[1] In another exchange of letters Trajan confirms a law of Pompey, amended by Augustus, about qualifications for membership in the provincial town councils.[2] This continuity, with its recognition of the decisions of other reigns, formed a solid basis for the steady, uninterrupted advance of legal science.

A further influence for development of very immediate importance to the students of the law was the legalizing by the emperors of the "*ius respondendi*" (the right of giving an interpretation on a disputed question of law). In the time of the Republic, when the science of law, though growing, was in its infancy, not only private individuals or state officials, but judges, who were not necessarily trained in the law, would carry questions to eminent students of the law for advice. The answers given had only the force of advice; but when the answer was given by an eminent jurist it often practically gained the force of law from his reputation. Augustus found this a workable means for development, and he encouraged it, while at the same time controlling the personnel of those holding the privilege, by actually delegating

[1] Pliny, Letters X, 65 and 66.
[2] Op. cit. X, 79 and 80.

his own authority (ut ex auctoritate eius responderent)[1] to qualified jurists of his own selection, to give legally binding answers to questions of law—the "*ius respondendi.*" If Pomponius may be trusted—he wrote in the second century a brief history of the development of law—the right was granted to only a few men in any generation, but was not confined to men of the senatorial class. An opinion on a point of law in a particular case given by one of them, written and sealed, was law, and the judge in the case was bound by it.

The opinions so delivered were called "*responsa prudentium.*" They were preserved and doubtless arranged by topics. The emperor Hadrian in the second century decided that a judge was bound by these recorded replies when they agreed, and was only free to make a new decision if they did not agree. No doubt the opinion of a living jurist on the case in point was binding as before. Furthermore these replies, as well as other sources such as direct enactments by the emperors, were taken up, commented on, and analyzed by jurists in formal treatises on various departments of law, and these treatises little by little themselves gained the force of law, especially in the field of private law. So much so that by the time of Constantine the numerous writings of Papinian and Ulpian were actually authoritative. A century later preeminent authority was bestowed by the emperor Theodosius II on the writings of five jurists, Gaius, Papinian, Ulpian, Paulus, and Modestinus, and quotations from earlier jurists found in their works. In case the five had differences of opinion on a point, the majority decided. And in case of an equal division of opinion, Papinian's view prevailed.[2] These jurists all wrote several centuries before the ruling was made. The remarkable prestige they enjoyed was due to their thoroughness.

To gain then an appointment to the enjoyment of the "*ius respondendi*" was the goal of every ambitious student of law, and a goal worthy of the talents and ambition of any man. It carried actual power, and prestige, and reputation with it. Not all could

[1] Digest I, 2, 2, 49.

[2] R. W. Leage, Roman Private Law (1909) p. 32 ff.; R. Sohm, Institutionen des Römischen Rechts (1920) p. 136 ff.

hope to attain it; but its attractive powers developed jurists whose formal writings in later times were quite on a par with writings of those who had possessed it. The best example is Gaius, whose Institutes, written in the second century, became the foundation of Justinian's Institutes.

The standards of the profession were held high. At the very beginning of the Digest Ulpian writes: "Men may call us the priests of justice, for we worship her . . . being engaged in the pursuit of a philosophy that is genuine, if I am not mistaken, and not counterfeit." In another book he terms the profession a "*res sanctissima*" whose services ought not to have a money value put on them, and should not be so dishonored.[1] In a quotation by the Digest from Papinian the statement is made: "To speak generally, it is not to be believed that we can have to do with acts done *contra bonos mores*."[2] Ulpian's definition of jurisprudence itself was: "Jurisprudence is the knowledge of things human and divine, the science of the just and the unjust."[3]

The profession, under such conditions, developed able men who devoted their lives to it, the sons oftentimes succeeding the fathers. The profession appealed to scholarly students of the law, but also to the pleader in the court, and to men interested in practical problems of government. Many of its chief adherents reached important positions of trust in public life. They held the consulship, governed provinces, and were in command of the praetorian guard, a high judicial rather than military position in the third century. The emperors gave them places in the imperial council. Undoubtedly many of the decisions and laws promulgated under the name of an emperor came from the advice of some jurist.

In the reign of Trajan the jurist Neratius Priscus gained such standing that he was made a member of the imperial council and was very seriously considered by Trajan as a possible successor to the throne. In the next reign, Hadrian's, he is found again in the imperial council, and with him Salvius Julianus and

[1] Digest L, 13, 1, 15.
[2] Digest XXVIII, 7, 15.
[3] Digest I, 1, 10.

Iuventius Celsus. These men all are quoted in the Digest. Julianus made for Hadrian the first and standard edition of the praetorian edict. About a century later the most renowned jurist of all, Papinian, while praetorian prefect, next to the emperors Severus and Caracalla, was the most influential and powerful person in the Empire. His sense of justice led him to oppose the murderous plans of Caracalla, and to refuse to defend the assassination of the emperor's brother, Geta. For this Caracalla had him put to death. He had had as assistants and advisers his own pupil, Ulpian, and Paulus—a triumvirate of jurists whose works make up about one half of the entire Digest. These two younger men later were also appointed to the post of praetorian prefect, and both were members of the imperial council of Alexander Severus. In the biography of that emperor it is stated that the good repute of the reign was due to the fact that the emperor depended largely on Ulpian's advice in the conduct of the government.

The work of the jurists dealt with every phase of the subject. The more or less mechanical ordering and systematizing of the law was carried to completion; but of greater significance was their influence in simplifying more and more the cumbersome legal procedure transmitted from the centuries past, and in bringing into new legislation principles of justice. For example, they recognized the people as the ultimate source of law. They stated that by nature all men are equal. To their influence probably was due Trajan's rescript that it was better for the guilty to go unpunished than for the innocent to be convicted. They established the principle that no man should be brought to trial twice on the same charge. For such principles they owed much to the long tradition of Roman justice, to growing humanitarian impulses, and not a little to the study of Greek philosophy. But to enter on the subject of sources and influences is beyond the scope of this paper.